VIRGINIA LAW REGISTER.

E. C. BURKS, Bedford City, Va.....EDITOR.
C. A. GRAVES, Washington & Lee University, Lexington, Va., } ASSOCIATE
W. M. LILE, University of Virginia, Charlottesville, Va., } EDITORS.

Issued Monthly at $5 per Annum. Single Numbers, 50 Cents.

Communications with reference to CONTENTS should be addressed to the EDITOR at Bedford City, Va.; BUSINESS communications to the PUBLISHERS.

MISCELLANEOUS NOTES.

HOCKMAN V. HOCKMAN.—After the report of this case in the last November No. of the REGISTER, a correspondent called attention to the dates given in the opinion of the court at p. 526 of the REGISTER, and, as according to these dates, the decree was not docketed until the 18th of November—more than five months after it was rendered and the deed of trust admitted to record—he suggested the question whether the lien of the decree had not lost its priority over the lien of the deed of trust by the failure to docket it within the time prescribed by sec. 3570 of the Code. The question was perplexing and caused an examination of the record in the case, which showed that the word "June" occurring several times in the opinion of the court at p. 526 of the REGISTER should have been "November," and therefore that the decree was actually docketed within nine days after it was rendered, and hence the difficulty suggested by the correspondent did not arise.

The opinion of the court, as published in the REGISTER, is an accurate reproduction of the copy furnished by the court's stenographer, and the mistake, therefore, as to dates, must have originated from mere oversight either in the preparation of the opinion or in the copying by the stenographer—we do not know which. Correction will be made in the official report, 93 Va.

HON. J. RANDOLPH TUCKER.—The press of the country has teemed with notices of the illness of this distinguished gentleman and the public mind has been filled with intense anxiety as to the result. Mr. Tucker was confined to his house some weeks ago by pleurisy and bronchitis. He seemed to be recovering, when suddenly an attack of heart trouble supervened—acute and alarming. We are glad to be able to state that recent intelligence assures us that there has been no return of the attack, that his condition is much improved and (at this writing) continues to improve, and we feel encouraged to hope that it will not be long before he is restored to his usual good health. Meanwhile, the duties of his chair as Law Professor in the Washington and Lee University are being acceptably discharged by Professor Graves, of the same school.

It is hardly necessary to say, what is known by all, that Mr. Tucker is an eminent jurist, and is especially recognized as among the foremost of all constitutional law-

yers now living. His death (God avert it!) would be a grievous loss, not only to his many personal friends, but also to the State and Nation he has so long and so faithfully served, and a calamity to the Washington and Lee University.

E. C. B.

GIFT CAUSA MORTIS—EFFECT OF PREVIOUS POSSESSION OF CHATTEL BY DONEE.—In the *American Law Register and Review*, Oct. 1896, p. 646, it is said that "according to a recent decision of the Queen's Bench Division, the rule that delivery of a chattel is essential to constitute a valid *donatio causa mortis* is satisfied by an antecedent delivery of the chattel to the donee, though *alio intuitu*:" citing *Cain v. Moon* [1896] 2 Q. B. 283. The opposite doctrine prevails in Virginia, and in most of the States. For a collection of the authorities in the United States, see 1 Va. Law Reg. 887–888. The law of Virginia is thus laid down by Baldwin, J., in *Miller v. Jeffress*, 4 Gratt. 472 (approved in *Yancey v. Field*, 85 Va. 756): "It is not the possession of the donee, but the *delivery* to him by the donor, which is material to a *donatio mortis causa*. . . . The delivery must accompany and form part of the gift; an after-acquired possession of the donee is nothing; and a previous and continuing possession, though by the authority of the donor, is no better."

The question is an interesting and important one; and we hope the English case of *Cain v. Moon* will be appealed.

REWARDS—RIGHT OF PUBLIC OFFICERS TO CLAIM.—In *Witty v. Southern Pacific Co.*, 76 Fed. Rep. 217, it is held, in accordance with what seems to be well settled principles, that where a deputy sheriff makes an arrest in discharge of his official duty, he is not entitled to claim a reward offered for the arrest. Upon the question as to what *is* the duty of an officer in making arrests, the court said that while it might not be his official duty to make a general search for the criminal, yet when specific information is conveyed to him that a felon is at a particular locality within his jurisdiction, it is his duty to take measures to apprehend him, and the law will not permit him to claim a reward for so doing.

There are many cases on this subject in the books. The consensus of opinion seems to be, that if the arrest is made in discharge of official duty no claim to the reward arises. The difficulty is in determining whether the arrest in a particular case was made in an official capacity and in discharge of official duty, or outside of it. See *Stamper v. Temple*, 6 Humph. 113 (44 Am. Dec. 296); *Pool v. City of Boston*, 5 Cush. 219; *Gilmore v. Lewis*, 12 Ohio, 281; *Kick v. Merry*, 23 Mo. 72 (66 Am. Dec. 658); *Hatch v. Mann*, 15 Wend. 44; *City Bank v. Bangs*, 2 Edw. Ch. (N. Y.) 95; *Davis v. Munson*, 43 Vt. 676 (5 Am. Rep. 315); *Russell v. Bartlett*, 44 Vt. 170; *Hayden v. Souger*, 56 Ind. 42 (26 Am. Rep. 1, and note in which the cases are collected). Probably the best considered case on this subject to be found in the reports is *Matter of Russell*, 51 Conn. 577 (50 Am. Rep. 55).

EMINENT DOMAIN—TAKING PRIVATE PROPERTY FOR PRIVATE USE—DUE PROCESS OF LAW.—In *Cole v. La Grange*, 113 U. S. 1, the Supreme Court of the United States held that a statute authorizing a municipal corporation to issue bonds by way of donation to a private manufacturing concern, in order to induce

location within its corporate limits, was unconstitutional, in that it took, in the form of taxation, the private property of one citizen for the benefit of another, and was therefore a taking of private property without due process of law. The same doctrine had been previously asserted in *Loan Assoc'n v. Topeka*, 20 Wall. 655, and was subsequently affirmed in *Fallbrook Dist. v. Bradley*, 164 U. S. 112.

A more recent application of the same principle is found in *Missouri Pac. Ry. Co. v. Nebraska*, decided Nov. 30, 1896 (17 Sup. Ct. 130), where an order of a State court, acting under authority of a State statute, requiring a railroad company to surrender permanently to private persons a part of its right of way for the erection and maintenance of a grain elevator for their private benefit, was a violation of the fourteenth article of amendment of the Constitution of the United States. The facts that the railroad company had already granted authority to others to erect elevators at the same place (upon terms not appearing in the record), and that an additional elevator would subserve public convenience and would not interfere with the operation of the railroad, were held not to take the case out of the general rule. The court is careful, however, to confine the decision to the case as presented, and expressly leaves open the question of the right of the State to compel the company itself to erect elevators when public convenience requires it, or to permit to all persons equal facilities of access from their own lands to its tracks for shipping purposes.

DEFINITION OF "CATTLE"—GOATS—HORSES—FOWLS.—In *State v. Groves* (N. C.) 25 S. E. 819, under a statute making it a misdemeanor to wilfully and unlawfully kill or abuse any "horse, mule, sheep, or other cattle," the court was called upon to decide whether the word "cattle," as here used, included a goat. Clark, J., who delivered the opinion, said that while the word "cattle" was often used in a restrictive sense as applicable to the bovine species only, it had another and broader meaning, which took in all domestic animals; and the context made it evident that it was here used in the broader sense.

"Indeed," said the court, "the broader sense is the more usual one. Worcester's definition, 'a collective name for domestic quadrupeds, including the bovine tribe, also horses, asses, mules, sheep, goats and swine,' was approved by this court in *Randall v. Railroad Co.*, 104 N. C. 410, 413 (10 S. E. 691). To the same effect are the Standard, Webster and Century Dictionaries. In the Scriptures, the word 'cattle' ordinarily and usually embraces goats, notably in the contract between Laban and Jacob. Gen. xxx, 30, 32. In *Decatur Bank v. St. Louis Bank*, 21 Wall. 294, the word 'cattle' is held to be broad enough to include even swine. In England, the statute 9 Geo. I., c. 22 (commonly called the 'Black Act') made it punishable with death, without benefit of clergy, to 'maliciously and unlawfully kill any cattle.' Under this it was held that the statute embraced domestic animals other than the bovine species, as a mare, in 2 East P. C. 1074; *Rex v. Paty*, 2 W. Bl. 721; and 'pigs,' in *Rex v. Chapple*, 1 Russ. & R. 77."

In *Chesapeake & Ohio R. Co. v. Bank*, 92 Va. 495 (1 Va. L. R. 825), it was held that a statute forbidding transportation companies from keeping "cattle, sheep, swine or other animals," confined for a longer period than twenty-eight hours, without unloading and allowing them to rest, included horses. In *State v. Dunnavant*, 3 Brev. (S. C.) 9 (5 Am. Dec. 530), the term "horses," in a criminal statute,

was held to apply to mares. "Cattle" usually includes horses and sheep: *Louisville etc. R. Co. v. Ballard*, 2 Metc. (Ky.) 177; also pigs: *Child v. Hearn*, 9 Exch. 176; but not buffaloes: *State v. Crenshaw*, 22 Mo. 457. A domestic fowl is an animal: *State v. Bruner*, 111 Ind. 98; and "bird or animal" would include a game cock: *People v. Klock*, 48 Hun, 275; and tame linnets are within the protection of a statute punishing cruelty to "domestic animals": *Colam v. Pagett*, 12 Q. B. Div. 66.

A UNIQUE PREFACE.—The following is the somewhat novel preface to an excellent work on Criminal Law (Leatherette, pp. XIX and 316), by John G. Hawley, Editor of American Criminal Reports, etc., and Malcolm McGregor, Secretary of the Detroit College of Law:

"Solomon said, 'Of making many books there is no end.' Job said, 'My desire is that mine adversary had written a book.' Although it is more than three thousand years since either of these things was said, yet they explain our reasons for writing this book. Giving precedence to Job, as the elder, it is to be noted that Job's meaning was that he had not intended to violate the law, but had intended to conform to it. If he had violated the law, he had done so unconsciously; because there was no existing book which set forth the law in such clear terms that a man could understand it by giving to it that amount of study which might reasonably be expected of one who performed—as Job so eloquently and pathetically tells us he did perform—the other duties which pressed upon him. Job did not mean, as has been insinuated by some authors whose books have been reviewed, that he wished that his adversary had written a book in order that he might have had a chance to review it.

"It appears in the sequel, in Job's case, that having intended and tried to do right and not to do wrong, that he had succeeded, and he was not a law breaker, a view of the law whieh we have tried especially to emphasize in this book.

"To return to Solomon. New books must be made because of the changing conditions of life, and because our law follows these changing conditions, and changes with them. There are many matters arising in the criminal law concerning which the law is different from what it was twenty years ago. There are many other questions which were then in dispute and unsettled, which are now settled. There are doctrines of the criminal law which then appeared to rest upon arbitrary grounds, which we can now see rest upon eternal and fundamental principles. There were then many conflicts of opinion between the courts of last resort in the different States which have now been practically settled.

"In writing this book, the ideas suggested by the remarks of Job and Solomon have been in our minds. We have endeavored (keeping Job in mind) to write a book which sets forth the criminal law clearly and tersely, so that a well-intentioned person may, with a reasonable amount of labor, understand it and have no difficulty in avoiding its violation. We have also endeavored (not forgetting Solomon) to write a book which illustrates the criminal law and its tendencies up to the very moment that we go to press."

It gives us pleasure to say that Hawley and McGregor's Criminal Law will not disappoint the reader of the above preface. It is clearly and forcibly written, and is up to date. It is published by the Collector Publishing Company, Detroit, Michigan.

BANKS AND BANKING—NOTE OF INDIVIDUAL PARTNER WITH PARTNERSHIP ENDORSEMENT.—In *Brown v. Pettit*, 35 Atl. Rep. 865, the Supreme Court of Pennsylvania lays down an important principle of commercial law which busy practitioners are apt to overlook, though the doctrine is not a new one. The facts were that one member of a firm made his individual note, and, without the knowledge or authority of his copartner, endorsed it in the firm name, and discounted the note with the plaintiff bank, directing the proceeds to be placed to his individual credit. The money was used for his private purposes. It was held that the bank did not occupy the position of a *bona fide* holder, but was charged with notice of the fact that the maker was using the firm name for his private purposes, and that the firm was not liable on the endorsement. The court says:

"The proper thing for him to do, in ordinary commercial usage, would have been to deposit the note, or its proceeds if discounted, to the credit of the firm. When he did not do that, he departed from the usual course, in requesting the bank to place the proceeds to the credit of his private account, and thereby made a manifest misappropriation of the firm's money to his own use. The responsibility of the bank in such circumstances is thus shown in the opinion of Lowrie, J., in the case (*Cooper v. McClurkan*, 22 Pa. St. 80) just cited. He says: 'The plaintiff says he is a *bona fide* holder, without notice of the character of the paper. Is he without notice? He is not, if the proper inquiries usually made by a prudent man would have led him to the knowledge of the fact that the acceptor or principal debtor had himself drawn the bill, or, in other words, made the contract that is intended to pledge the partnership as surety for himself. Common prudence demanded that the authenticity of the signature of the drawers should be ascertained, and this led directly to the fact that it was made by Fleming himself, and common sense would indicate that Fleming had no right to bind his partner as his surety. It is urged that in borrowing money copartners may give to their negotiable paper what form they please, and that, therefore, they ought to be liable here, notwithstanding the form. The premise is true, but the conclusion needs for its support the proof that the copartners did borrow the money. If they did, then Fleming is an accommodation acceptor, and the drawers are bound as the real debtors. Without this proof we must take the apparent transaction to be the true one, and regard Fleming as borrowing money for himself, and attempting to pledge his partner as his surety.' . . . . . When he [the maker of the note] endorsed the firm's name and asked the banker nevertheless to place the proceeds to his individual credit, it was a direct and immediate application, with the knowledge and consent of the banker, of the firm's money to the personal use of the maker."

Similar principles were applied in *Stainback v. Bank of Virginia*, 11 Gratt. 269, and *Stainback v. Read*, Id. 281. In each of these cases an agent, with full authority to draw or endorse in the name and on behalf of the principal, drew bills in his own name, and having endorsed them in the principal's name, procured the plaintiff bank to discount them and place the proceeds to his individual credit. It was held that the placing of the proceeds to the credit of his private account put the bank on notice that the agent was dealing with the subject of his agency for his own benefit, and that, therefore, the principal was not bound. See further on the subject *Tompkins v. Woodyard*, 5 W. Va. 216; *Wilson v. Williams*, 14 Wend. 146 (28 Am. Dec. 518, and note). The question is discussed in various aspects in

a valuable note to *Altoona etc. Bank v. Dunn* (Pa.), in 31 Am. St. Rep. 742, 755–757, with full citation of authorities.

A QUIET TEXAS PONY.—Ex-Chief Justice Bleckley, of Georgia, has a rival in Judge Wilkes of the Supreme Court of Tennessee, as evidenced by the following extract from the opinion in *Lyons v. Stills*, 37 S. W. 280:

"This case involves the life and death of a Texas pony. . . . It appears that the plaintiff, Lyons, was a trader in Texas ponies, and sold the animal to the defendant, who was a farmer. The defendant was in the act of leading the pony away to carry her home, with an ordinary halter upon her, when the plaintiff suggested that a 'slip halter' would suit the temperament and disposition of the animal better. He thereupon furnished the defendant with a slip halter, and had one of his experienced helpers put it on the pony, and adjust it properly. He then advised the defendant to lead the pony home by the 'slip halter,' and not to turn her loose or put her into a stable, but to tie her to a post until she was gentle. Defendant obeyed the instructions, and following the directions of the plaintiff, carried the pony home and hitched her to a post, gave her some corn and fodder and left her for the night. The next morning the plaintiff came around to see if the pony was making any progress toward getting gentle, and found her very quiet; in fact she was dead. He says he does not certainly know what caused her death, but thinks it was because 'she could not get her breath.' This seems quite probable, as the 'slip' halter was found to have 'slipped' down and become tightened around her nostrils. It does not appear that she had any disease; certainly she was full of life the evening before, and showed no signs of any ailment. She was a small pony mare, well formed, with bright eyes, and a remarkably active pair of heels. The defendant was sued on the note. He defended on the ground that he only took the pony on probation for six months, and by the contract had the right, at any time he was dissatisfied, to rescind the trade, and deliver up the pony. It does not appear that he made any effort to return the animal. His counsel excuse this on the ground that he was prevented by the 'act of God.' Defendant in his proof, however, says he was prevented from making the return by the 'act of the pony.' We think the formal tender or delivery back of the pony was, under the circumstances, an immaterial matter, not going to the merits of the case. Defendant states that when he saw the pony had committed suicide he did not care to keep her any longer, and he therefore exercised his option to rescind the trade. His theory after the pony died, was that she belonged to the vendor, and had never become his property, and hence it was not his loss."—And the court agreed with him.

The pathetic and circumstantial description of the heroine of this tragedy, and of her sad taking off, whets our appetite for further details of her personal history. Thanks to the kindness of the court, we know that she was no Rosinante—knock-kneed and double-jointed, dull of eye and slow of movement—but "small," "well formed," with "bright eyes," and, true to her sex and her ancestry, possessed of a "remarkably active pair of heels." But whether her coat was white or black, or a Texas brindle; whether her teeth were new and betrayed the heyday of colthood, or marked her as old in tricks with heel and halter; whether she left offspring—had she a father or had she a mother; were her remains buried in the

cross-roads or deposited in the bone-yard—these are questions which the judicial biographer has left unanswered.

NEGLIGENCE AS A DEFENCE TO FRAUD AND DECEIT.—We take the following from the *American Law Review*, Nov.-Dec., 1896:

"In the case of *Aaron's Reefs. v. Twiss*, 74 Law Times Rep. 794, the House of Lords dealt another blow at the doctrine, still weakly clung to by some of the American courts, that negligence on the part of a person who has been defrauded is a defense to an action by him against the perpetrator of the fraud to rescind the contract induced by the fraud. The House of Lords hold that, as between the immediate parties to the transaction, no negligence or laches is available as a defense on the part of the person guilty of the fraud, unless it involves such a delay as bars the action under the statute of limitations. In other words, the highest court in Great Britain has dealt another, and it is to be hoped a finishing blow, to the shameful doctrine, that where a man has, by lying to me, induced me to enter into a contract with him to my disadvantage, and I bring an appropriate action against him, a court of justice will allow him to say to me: 'Although I lied to you and deceived you and thereby induced you to make the agreement, yet you have no right to any legal remedy, for the reason that you were negligent in not finding out that I lied to you, that is to say, guilty of negligence in believing me.' It is a striking commentary upon the evolution through which legal doctrines have gone, that such a doctrine could ever have found favor with any public body calling itself a court of justice. The true limit of the doctrine is that it comes into play only where the rights of innocent third persons, acting upon the faith of the existence of the contract, have supervened. Take, for example, the case where a person is induced by a lying prospectus to subscribe to the shares of a corporation. Here, if he seeks a rescission or damages in any appropriate form of action against the immediate parties who committed the fraud, no laches or negligence short of the bar of the statute of limitations will put him out of court. But if the rights of creditors of the company have supervened, if they have given credit on the faith of the company having a subscribed share capital made up in part of his subscription, and if they would not have given that credit but for his laches in failing to discover the truth,—then the doctrine will not apply as against them, and he will not be allowed to get out of his bargain."

See on this subject, 1 Va. Law Reg., p. 305, commenting on the case of *Lake v. Tyree*, 90 Va. 719, where it is said that where the means of knowledge are at hand, and equally available to seller and buyer, the buyer has no remedy by reason of the seller's false representations, but must abide the consequences of his own folly or carelessness. The English rule is to the contrary, and is believed to be the better and sounder doctrine. And see *Brown v. Rice*, 26 Gratt. 473, where the law is approved as thus laid down in Kerr on Fraud and Mistake, pp. 80–81: "A man to whom a particular and distinct representation has been made is entitled to rely on the representation, and need not make any further inquiry. . . . No man can complain that another has relied too implicitly on the truth of what he himself stated." And in *Hull v. Fields*, 76 Va. 607, this language of Lord Chelmsford is quoted with approval: "When once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved

from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon the objector: 'You at least, who have stated what is untrue, or have concealed the truth for the pnrpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly on your fairness and honesty.'" *Directors &c. of Central &c. R. Co. v. Kisch*, L. R. 2 H. L. 99, 120. See also, Maupin's Marketable Title to Real Estate, p. 245, and n. 1.

JUDGE ROSE'S ADDRESS BEFORE THE VIRGINIA STATE BAR ASSOCIATION.—We print in this number of the REGISTER the latter part of Judge Rose's address on "The Present State of the Law"—about one-third of the whole—and regret that we have not space for it all. We did not have the pleasure of hearing the address when delivered; but we have read it more than once, and affirm with confidence that the high praise bestowed on it by Mr. R. G. H. Kean, in 2 Va. Law Reg. 310, is well deserved. It is full of wit and humor, and shows evident marks of extensive reading and wide culture.

The address opens with a masterly delineation of the character of Sir Edward Coke, the oracle and incarnation of the Common Law as it was in his day, as contrasted with that of Lord Bacon, the original advocate of law reform and codification. "It is needless to say that Coke was not a reformer. His object was to perpetuate, not to change." . . . "What Bacon desired was that Parliament should enter upon a career of cautious, prudent, and enlightened law reform." . . . "In 1592, when Bacon was thirty-one years of age, he proposed in the House of Commons a plan to amend, consolidate, and condense the whole body of English laws, to reduce them in bulk, to simplify them in form, and to render them consistent, leaving out all repetitions, and whatever was obsolete."

As will be seen from the portion of the address which we print, Judge Rose takes a gloomy view of the present condition of the law. His remedy is codification; and he declares that "the question is, whether Bacon was right in thinking that case law should be regarded as only provisional, and that it ought to be revised, arranged, condensed, and re-uttered in statutory form, so that the whole law might be briefer, more systematic, more comprehensive, more intelligible, and more authoritative." And he thus shows how the Inductive Philosophy should be applied to the science of the Law:

"If the law in its highest aspects has failed in its development in respect of harmony, or symmetry, or unity, or facility of being understood, that result has been reached through causes that Bacon distinctly pointed out and repeatedly warned us against. Although he recommended the closest, most analytical, and most discriminating scrutiny of individual instances, thereby opening the door to infinite diversity, yet he urged in the most impressive manner that through this diversity, by means of arrangement, co-ordination, and scientific classification, we should re-establish unity and harmony and symmetry, on larger, truer, and more intelligible foundations. . . . Everywhere he inculcated the necessity of classifying and organizing all facts of external observation, not only with a view to the preservation of knowledge, but also with a view to facilitate the making of new discoveries, looking also possibly to that unification of knowledge, which to this time remains no more than a pleasing dream."

"It might have been supposed that the law, being largely experimental, and

naturally adjusting itself easily to comprehensive rules, would have offered the most obvious and inviting field for the exhibition of the theories of Bacon; but his teachings have had perhaps less effect on English law than on any other science. The practice of reporting individual cases, which he found established, was an anticipation to some extent of his methods of critical inquiry as to individual instances; but the legal profession rejected his doctrine of careful classification and constant and scrupulous revision upon every new accession of knowledge. It is, however, a safe prediction that his doctrines, triumphant in all other fields of inquiry, must eventually prevail in English and American law, the most intractable of all materials yet encountered."

Again, speaking of codification, Judge Rose says:

"We know that the intelligent advocate of a code does not propose to change the law itself, but only to change the form in which it is expressed, cancelling whatever is obsolete, contradictory, or redundant, reducing the remainder to an orderly arrangement. But the Italians have a well-known saying that the translator always betrays; and, as the proposed change of form is a kind of translation, we tremble for the result. We fear that while the wine is being decanted from one vessel into another some drop of the precious fluid may be lost; or that some fermentation may supervene that may impair the flavor of the whole. . . . But every great change is attended with fears, many of which are usually groundless. By whomsoever done, the work will no doubt bear that stamp of imperfection which seems to be the trade-mark of the visible universe; but it can hardly be worse than our present state in which the law is fast drifting from the region of the unknown to the region of the unknowable. After all, though the talents of Coke and the genius of Bacon would not be amiss in the accomplishment of such a task, yet the qualities required, though of a high order, are not really of the highest; patience, fidelity, and accuracy being most in demand."

We have made these quotations from the omitted portion of Judge Rose's address in order fairly to present, with what is printed, his position as to codification. It is certainly a weighty fact that Bacon believed this to be the remedy for the confusion and uncertainty of the law. To quote once more from Judge Rose: "So thoroughly conscious was Bacon of the necessity of the work for which he had endeavored to obtain the sanction of Parliament, that he afterwards resolved to carry it out as an individual enterprise. In his 'Proposal for Amending the Laws of England,' addressed to James I, he showed that he had thoroughly matured his scheme, and that he contemplated nothing revolutionary. 'I dare not advise,' he said, 'to cast the law into a new mould. The work which I propound tendeth to pruning and grafting the law, and not to plowing it up and planting it again; for such a remove I should hold indeed for a perilous innovation.' Of this project of Bacon, which he was compelled to forego, Kent says (1 Com. 505): 'He made a proposal to King James for a digest of the whole body of the common and statute law of England; and if he had been encouraged and enabled to employ the resources of his great mind on such a noble work, he would have done infinite service to mankind, and have settled in his favor the question, which he said would be made with posterity, whether he or Coke was the greater lawyer.'"

C. A. G.

THE MISCARRIAGE OF JUSTICE IN WEATHERHOLTZ'S CASE.—In August, 1896, in the County Court of Shenandoah County, at Woodstock, Elmer A. Weatherholtz was tried for the murder of his wife, Minnie A. Weatherholtz, and found guilty of murder in the second degree.

The death of Mrs. Weatherholtz occurred under the fol wing circumstances: On the morning of February 4, 1896, she went out to the barnyard to milk the cows. As she reached the gate, she was instantly killed by a load of No. 2 shot fired full in her face by some one concealed in the barn. Forty of the shot passed through her forehead, between the eye-brows and hair, and penetrated the brain. Her little boy was by her side, and she was singing when the report of the gun was heard, and she was seen to fall.

It is unnecessary to refer to the evidence which showed that Elmer A. Weatherholtz was guilty of this foul murder by lying in wait. But the jury convicted him of murder *in the second degree*, and fixed his punishment at eighteen years in the penitentiary. This conviction was set aside by the presiding Judge, Hon. E. D. Newman, on his own motion, as contrary to the law and the evidence. Judge Newman's reasons are best given in his own words, which we take from the *Shenandoah Valley*, of Aug. 20, 1896:

"OPINION AND ORDER OF COURT SETTING ASIDE VERDICT OF JURY.

"*Commonwealth of Virginia v. Elmer A. Weatherholtz.*

"You, Elmer A. Weatherholtz, have been put upon your trial for murder, the jury have found by their verdict that you are not guilty of murder in the first degree. This was their province and their duty, provided they entertained a reasonable doubt as to your guilt on that portion of the charge, as given them by the court (though the court differs from the jury in the conclusion to which they arrived on the question of your being guilty of murder in the first degree). You, therefore, stand acquitted of the charge of murder in the first degree. [Code Va., sec. 4040.]

"If murder was committed, every particle of evidence introduced and every circumstance in the case shows that it was committed by some one 'by lying in wait.' There is the absence of the slightest suspicion that murder was committed in this case, except by some one 'lying in wait,' with intent to commit the deed. Section 3662 V. C., 1887, says in specific terms that 'murder by lying in wait is murder in the first degree.' The jury in your case, however, have gone further, and by their verdict have found you guilty of murder in the second degree, and have fixed your punishment at the severest term in their power for murder in the second degree, viz.: eighteen years in the penitentiary.

"As stated above, there is not in this case a scintilla of evidence tending, even in the slightest degree, to create the slightest impression or suspicion of guilty of murder in the second degree against you or against any other person.

"The most exhaustive search for evidence, and preparation for trial, known to the history of criminal trials in this county, was made in this case by the attorney for the Commonwealth. The able defence brought out all the evidence that it was possible to find on that side, and if there had been such a crime as *murder in the second degree* committed, some evideuce tending, if even remotely, to point toward a faint suspicion of the commission of such crime would have been found.

"Therefore, having been acquitted of a crime of which the court believes you

to be guilty (murder in the first degree), you have been by the jury found guilty of a crime of which you are manifestly not guilty (murder in the second degree).

"This court is sworn to enforce the laws of this Commonwealth impartially, and without fear or favor, and every prisoner brought before it for trial, in a matter of life or liberty, is under the protection of this court.

"The court is called upon to pass sentence upon you, and thereby render itself a party to the enforcement of a verdict that declares you to be guilty of an offence (murder in the second degree) as to which, viewed in the light of the evidence introduced in the case, it would have been as reasonable for the jury to have found the court guilty as to have found you guilty.

"Therefore, you having refused, through your counsel, to move to set aside the verdict, the court is constrained, on its own motion, to set it aside, and the said verdict of the jury is accordingly set aside, as contrary to the law and the evidence, and a new trial is ordered in this case, which is now continued until the next term of this court, and the sheriff is ordered to convey the prisoner to the county jail of the county of Frederick, there to be safely kept subject to the order of this court."

The subsequent proceedings in Weatherholtz's case, when brought to Woodstock for his second trial, on November 16, we take from the *Staunton Daily News* of November 17:

"Weatherholtz presented to the court through his counsel an affidavit asking his discharge from the indictment under which he had been convicted of murder in the second degree. This paper recited the facts in the case, and asked a dismissal on the grounds, that, having been convicted of murder in the second degree contrary to the law and the evidence, which verdict had been set aside by the Judge as such, he could not be again tried for murder in the first degree; that, if convicted on a new trial of murder in the second degree, that verdict would also have to be set aside as contrary to law and evidence; and that, these things being true, and he being about to be tried on two other indictments, it would prejudice his case in these if this first indictment were hanging over him.

"Here arose a conference between the counsel on both sides and the Judge as to the next step to be pursued. The Commonwealth's attorney announced that, while he had newer and stronger evidence against the prisoner to show the prisoner's guilt, he had none stronger than on the first trial to show murder in the first degree. It was then developed that, if Weatherholtz were tried for murder in the second degree, and in the trial the Commonwealth left out all evidence to show that it was murder in the first degree, in order that the jury might bring in a verdict of murder in the second degree in conformity with the law and the evidence brought before it, yet the counsel for the prisoner might bring in evidence to show that it was murder in the first degree, if they chose, and not murder in the second degree as charged in the indictment, and thus have a verdict for murder in the second degree set aside as contrary to the law and the evidence. Thus, as the prisoner could not be again tried for murder in the first degree, and, as a verdict for murder in the second degree would be set aside by the court, there was only one thing to do—dismiss the prisoner. The Commonwealth hesitating to enter a *nolle*, the Judge dismissed the indictment."

The net result in Weatherholtz's case is thus seen to be that, between judge and

jury, he escaped punishment altogether for the killing of his wife—and this though the judge thought him guilty of murder in the first degree, and the jury had convicted him of murder in the second degree.

It may be assumed that the jury erred in finding Weatherholtz's crime murder in the second degree; but the question arises, was Judge Newman bound to set the verdict aside, instead of sentencing the prisoner upon it? On this point, we do not propose at this time to express an opinion, but we would solicit the views of the profession upon it.

The question is not new in Virginia. It arose in 1889, in Accomac county, in the case of Mrs. Virginia Taylor, who was tried for the murder of her husband by poison. The jury found her guilty of murder in the second degree, and fixed her punishment at five years in the penitentiary, and the County Court sentenced her upon the verdict. Upon writ of error this judgment was reversed by the Circuit Court (Judge Gunter), the verdict set aside, and the prisoner discharged.

The Taylor case caused much comment at the time, and was discussed in the *Virginia Law Journal*, July 4, 1889, by John H. Dinneen, Esq., upholding the action of the Circuit Court in setting aside the conviction of murder in the second degree, and in the *Virginia Law Journal*, July 18, 1889, by Charles L. Page, Esq., contending that the judge should have sentenced the prisoner in accordance with the verdict. Speaking of the ruling of the Circuit Court, Mr. Page says: "It seems to me to be utterly repugnant to the very principle upon which courts of error are established—not for the correction of *all* error, not to grant new trials to defendants in criminal cases for *every* error which the trial court may commit, but only for such error as is *prejudicial*. One can very easily perceive the reason and spirit of the rule which would set aside a verdict of murder in the first degree when the defendant properly should have been convicted only of murder in the second degree. It is one of justice and humanity; but it would be difficult to imagine any principle of this character involved in the converse—that is setting aside a conviction of murder in the second degree solely on the ground that the prisoner ought to have been convicted of the higher offence. If error at all, it was, of course, error manifestly in her favor, and of which she should never have been heard to complain." It will be remembered that in Weatherholtz's case the prisoner was willing to acquiesce in the verdict of murder in the second degree, and his counsel refused to move to set it aside, which was done by the judge *ex mero motu*.

As to the effect of the action of the Circuit Court in setting aside the verdict in the Taylor case, Mr. Dinneen and Mr. Page agree that Mrs. Taylor should have been tried again, but for different reasons. Mr. Dinneen says: "In Mrs. Taylor's case, although she was tried by a court of competent jurisdiction, the verdict was set aside on her own motion because it found her guilty of a crime not charged in the indictment; for murder by poisoning is not murder in the second degree any more than it is arson or treason, and she was entitled to a verdict on the crime charged—viz., murder in the *first* degree. It is no answer to this to say that an indictment charging murder substantially charges murder in the second degree, and the verdict of conviction of that crime responds to the general charge of murder. This may be true generally, but when the indictment charges murder by poisoning or by lying in wait, a distinct offence is charged, which is either murder in the first degree or nothing; and a verdict finding thereon in the second degree

is simply a verdict not warranted by law—no verdict at all—and a trial *de novo* should be had just as if a juror were to die, and the rest of the jury be discharged without rendering any verdict."

Mr. Page dissents from this reasoning, but reaches the same result as follows: "Mrs. Taylor was released upon the ground set up and pleaded by herself, that she could not on the indictment on which she was tried, be lawfully convicted of murder in the second degree, or any other offence than murder in the first degree. The decision of the Circuit Court, sustaining her plea, was an adjudication of the question that she could not; and had she been arraigned and tried again on the indictment, she would have been *estopped* from pleading that she could not lawfully be tried again for murder in the first degree. The judgment of the Circuit Court upon the writ of error was a plain and direct decision on the point, and the question would have been *res adjudicata*. She would have been estopped legally, as certainly she was in good conscience, from setting up any such defence."

In the Taylor case, the indictment charged that the murder was by poison; and the reasoning of Messrs. Dinneen and Page, in the passages just quoted, is based on this fact; but in Weatherholtz's case, it did not appear *by the indictment* that the gun was discharged by Weatherholtz while lying in wait.

It is to be hoped that if an erroneous verdict of murder in the second degree shall again be found in a case like that of Mrs. Taylor or Weatherholtz, the ruling of the County and Circuit Court may be such as will enable the question of its effect to be taken to the Court of Appeals for final decision. Meanwhile, as was stated above, we shall be glad to receive discussions of the subject for publication in the REGISTER.